UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,   **07 Civ. 462 (JGK)**
                                                 05 Cr. 1264 (JGK)
              - against -

                                                 MEMORANDUM OPINION
RICHARD VITRANO,   **AND ORDER**

                      Defendant.
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JOHN G. KOELTL, District Judge:

     The defendant, Richard Vitrano, moves pursuant to 28 U.S.C.

§ 2255 to vacate, set aside, or correct the sentence imposed by

former Chief Judge Michael Mukasey of this Court on February 15,

2006, sentencing the defendant principally to a term of 48-

months imprisonment on a one count information, 05 Cr. 1264, for

wire fraud, in violation of 18 U.S.C. § 1343, to be served

consecutively to an 8-month term of imprisonment for a violation

of supervised release in 96 Cr. 781, giving the defendant a

total effective sentence of 56 months. The defendant raises

several arguments in his § 2255 motion (No. 07 Civ. 462, Doc.

1) and in his accompanying, related Motion to Quash Defective

Search Warrant (No. 05 Cr. 1264, Doc. # 24). The defendant

claims that (1) the Government breached its plea agreement with

the defendant by arguing for a consecutive term of imprisonment

on the violation of supervised release; (2) the restitution

order entered by Chief Judge Mukasey was erroneous; (3) the

search warrant that was issued in the case should have been

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quashed; and (4) the Government has acted in bad faith in failing to request a sentencing reduction for the defendant's alleged cooperation. For the reasons stated below, the defendant's § 2255 motion and motion to quash are **denied**.

The defendant's challenge to the restitution order fails because the Court lacks subject matter jurisdiction to consider a non-custodial order of restitution pursuant to § 2255. See United States v. Kaminski, 339 F.3d 84, 85 n.1 (2d Cir. 2003). Additionally, even if the defendant's objections to the restitution order were construed as a motion for a writ of error coram nobis, the motion would be denied because the defendant's claim regarding the restitution order "plainly could have been raised on direct appeal from the judgment of conviction," but was not. See Chacko v. United States, No. 04 Civ. 2258 (JGK), 2005 WL 1388713, at *4 (S.D.N.Y. June 8, 2005).

Second, the plea agreement between the defendant and the Government provided that "the defendant will not file a direct appeal, nor litigate under Title 28, United States Code, Section 2255 and/or Section 2241, any sentence within or below the Stipulated Guidelines Range [of 46 to 57 months]." (See Ex. A. to Gov't Letter, Feb. 22, 2007 ("Plea Agreement"), at 5.) Because the defendant was sentenced within the stipulated

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guidelines range, he cannot challenge his sentence now.[1] See,

e.g., Garcia-Santos v. United States, 273 F.3d 506, 508 (2d Cir.

2001); United States v. Fisher, 232 F.3d 301, 303 (2d Cir.

2000); United States v. Yemitan, 70 F.3d 746, 747–48 (2d Cir.

1995).

The defendant's claims are also procedurally barred because

the claims were not raised on direct appeal, and the defendant

has not shown cause for failing to raise the issues, prejudice

resulting therefrom, or that he is actually innocent. See,

e.g., Rosario v. United States, 164 F.3d 729, 732 (2d Cir.

1999); see also Garcia-Santos, 273 F.3d at 509 (stating that the

waiver of appeal provision in a plea agreement does not

constitute "cause" for failing to take a direct appeal).

Finally, the defendant's claims also fail on the merits.

First, the defendant has not shown that the Government breached

the plea agreement by arguing for a consecutive sentence on the

violation of supervised release. The plea agreement expressly

permitted the Government to argue for a consecutive sentence and

also provided that the plea agreement superseded all prior

agreements between the parties. (See Plea Agreement at 4, 6–7.)

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[1] The appeal waiver would not, however, cover the restitution
order, see United States v. Oladimeji, 463 F.3d 152, 157 (2d Cir.
2006), which as stated above fails for other reasons. The appeal
waiver also arguably would not bar a challenge to the sentence of 8
months for a violation of supervised release. The Government only
argues that the appeal waiver bars a challenge to the sentence of 48
months for the wire fraud conviction. (See Gov't Letter, Feb. 22,
2007, at 7 n.*.)

In addition, Chief Judge Mukasey's allocution of the defendant

was more than sufficient to ensure that the defendant's

acceptance of the plea agreement was voluntary, knowing, and

intelligent. (See Ex. B to Gov't Letter, Feb. 22, 2007, at 14–

15.)

Second, the defendant's motion to quash the allegedly

defective search warrant, issued by Magistrate Judge Andrew J.

Peck on April 22, 2005, also fails. (See Ex. 2 to Aff. of James

P. Wynne, Nov. 13, 2006 ("Wynne Affirmation"), attached to Gov't

Letter, Nov. 13, 2006.[2]) The defendant argues that the search

warrant should be quashed because it was tainted by a material

falsehood. Any claim of a defective search warrant was waived

when the defendant pleaded guilty. See United States v. Arango,

966 F.2d 64, 66 (2d Cir. 1992); United States v. Hudak, No. 02

Cr. 853 (JFK), 2003 WL 22170606, at *5 (S.D.N.Y. Sept. 19,

2003). In any event, the "material falsehood" alleged by the

defendant was a statement by the defendant's former business

partner that the lease for the searched premises was in the

former business partner's name, and not the defendant's, when in

fact, according to the defendant, the lease was in the

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[2] Although the Wynne Affirmation was submitted in connection with
a separate motion the defendant has pending for return of property,
which is being treated as a separate civil action for equitable
relief, see Vitrano v. United States, No. 06 Civ. 6518 (JGK) (filed
August 29, 2006), the defendant has referenced the Wynne Affirmation
in both his motion to quash and his § 2255 motion, and thus the Court
considers it as part of this record.

defendant's name. (See Pet. at 6.) However, this "material

falsehood" was provided to Agent Wynne on April 26, 2005, four

days after the search warrant issued, and thus could not have

tainted the previously issued search warrant. (Compare Wynne

Affirmation, ¶ 5, with Pet. at 6.) Agent Wynne never claimed to

have included this information in the warrant application. Even

if he had, including the alleged false fact that the lease was

owned by a person other than the defendant would not have

supported the existence of probable cause because the

investigation targeted the defendant. On the other hand,

inclusion of the alleged correct information would have

supported the existence of probable cause and the issuance of

the search warrant. For these reasons, the defendant's

challenge to the search warrant, apart from being procedurally

barred, is also without merit.

Finally, apart from his bare allegations, the defendant has

made no showing that the Government acted in bad faith in

failing to submit a request for a sentence reduction on the

defendant's behalf. Therefore, the defendant's claim that the

Government acted in bad faith is also without merit. See Wade

v. United States, 504 U.S. 181, 186 (1992) ("[A] claim that a

defendant merely provided substantial assistance will not

entitle a defendant to a remedy or even to discovery or an

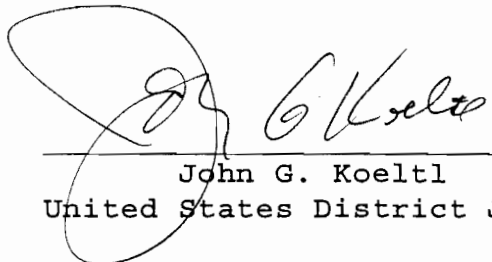evidentiary hearing. Nor would additional but generalized allegations of improper motive.").

<u>CONCLUSION</u>

The Court has carefully considered all of the defendant's remaining arguments and, to the extent not already addressed in this Opinion, found them to be either moot or without merit. For all of the reasons stated above, the defendant's motion pursuant to § 2255 (No. 07-Civ-462) and his motion to quash the allegedly defective search warrant (No. 05-Cr-1254, Doc. #24) are **denied**.

The Clerk of Court is directed to enter judgment dismissing the petition in 07 Civ. 462 (JGK) and closing both of these cases. The Court declines to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c) because the defendant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED.

Dated: New York, New York
          September 28, 2007

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          John G. Koeltl
    United States District Judge